TR Eri ak Ajok v District Officer of Simunjan & Ors

HIGH COURT (KUCHING) — APPLICATION FOR JUDICIAL REVIEW NO KCH-13JR-1 OF 2011
RHODZARIAH BUJANG J
5 APRIL 2012

Civil Procedure — Judicial review — High Court — Termination of Tuai Rumah via letter — Termination informed about two and half months after termination had taken effect — Whether there was arguable case — Whether termination in accordance with circular memorandum appointing him to post — Whether late communication of termination had satisfied criteria of irrationality — Whether termination bad in law — Whether letter of termination null and void

The applicant was, the *Tuai Rumah* ('village headman') of Kampung Emplas, Simunjan, Sarawak since 1961 but he was only officially appointed to the post in April 1982. However, on 17 June 2011 the applicant was informed of the termination of his appointment through a letter signed by the District Officer of Simunjan ('the first respondent'). The letter of termination was also enclosed and signed by the Director of Human Resource Management Division ('the second respondent'). The termination letter was dated of 28 March 2011 and the effective date of the termination was stated as 1 April 2011. This meant that the applicant was only informed of his termination about two and a half months after the termination had taken effect. The applicant proceeded to file an application for leave to apply for judicial review of that decision and such a leave was granted. In granting leave, it was held that there was an arguable case whether the termination was in accordance with the circular memorandum appointing him to the post because it appeared that the revocation was backdated by two and half months.

Held, allowing the application in part:

(1) Though it cannot be denied that in the days of old, prior to this circular, a *Tuai Rumah* was appointed by way of 'adat' or tradition based on the support the appointee enjoyed from the majority of the households in the longhouse, such consideration was no longer the determining factor in the post-circular period. The applicant cannot argue that the circular did not apply to him because he was formally appointed after it came into effect and his appointment, prior to the termination, was made under it. The terms and conditions therefore bind him and the prerogative of the appointment lay solely with the state government. Even though there was probability to the applicant's assertion that he enjoyed the support and

confidence of the majority of the households in his longhouse but this was not a ground for him to continue to cling on to his post as *Tuai Rumah* (see para 10).

(2) Since the applicant held the office of *Tuai Rumah* at the pleasure of the state government, the grounds for terminating his appointment was not open for examination by the court. Drawing this conclusion however did not mean the end of the line for the applicant. There were sufficient case authorities in support of the statement that in an application for judicial review, the court could examine the decision making process or the manner in which the decision was made, although not so much the merit of the decision (see para 12).

(3) The inordinate delay in conveying the decision on the termination is in complete defiance of reason and logic. The late communication of the termination had satisfied the criteria of irrationality. The decision to terminate, even if the option of payment of the honorarium was chosen, must logically and of necessity be communicated to a *Tuai Rumah* before the effective date of termination or at the very least, on the very day of the termination itself and ideally, the honorarium be paid at the same time as when the decision was communicated. It was not only unfair to the applicant but to the community he served for there were ramifications following such a delay. A *Tuai Rumah* would and could have happily performed his official duties as *Tuai Rumah* such as the common act of certifying or verifying documents for his people when in fact he was no longer holding the post as one. In that circumstance, the certification or verification would be rendered invalid and may even have legal repercussions, to the owner of the documents. Therefore, the act of notifying him of the termination only so many months after the effective date, even if one were to excuse the delay in payment of the honorarium, had rendered the termination bad in law and the letter of termination null and void (see paras 14–15).

[Bahasa Malaysia summary

Perayu merupakan, Tuai Rumah ('ketua kampung') Kampung Emplas, Simunjan, Sarawak sejak 1961 tetapi beliau hanya dilantik secara rasmi untuk memegang jawatan tersebut pada April 1982. Walau bagaimanapun, pada 17 Jun 2011 pemohon dimaklumkan mengenai penamatan pelantikannya melalui sepucuk surat yang ditandatangani oleh Pegawai Daerah Simunjan ('responden pertama'). Surat penamatan tersebut juga dikepilkan dan ditandatangani oleh Pengarah Bahagian Pengurusan Sumber Manusia ('responden kedua'). Surat penamatan tersebut bertarikh 28 Mac 2011 dan tarikh penamatan tersebut berkuat kuasa dinyatakan sebagai 1 April 2011. Ini bermaksud bahawa pemohon hanya dimaklumkan mengenai penamatannya hanya selepas dua dan setengah bulan penamatan tersebut berkuat kuasa. Pemohon meneruskan untuk memfailkan satu permohonan untuk kebenaran

memohon semakan kehakiman untuk keputusan tersebut dan kebenaran tersebut diberikan. Ketika memberikan kebenaran tersebut, diputuskan bahawa terdapat kes yang boleh dipertikaikan sama ada penamatan tersebut dibuat menurut memorandum pekeliling yang melantik beliau untuk jawatan tersebut kerana didapati bahawa pembatalan tersebut telah diundur tarikh selama dua dan setengah bulan.

Diputuskan, membenarkan sebahagian permohonan:

(1) Walaupun tidak boleh dinafikan bahawa pada masa lampau, sebelum pekeliling ini, seorang *Tuai Rumah* dilantik melalui cara 'adat' atau tradisi berdasarkan sokongan pelantik daripada majoriti seisi rumah di rumah panjang, pertimbangan sedemikian tidak lagi merupakan faktor menentukan dalam tempoh selepas pekeliling. Pemohon tidak boleh mempertikaikan bahawa pekeliling tidak terpakai ke atasnya kerana beliau dilantik secara rasmi selepas pekeliling tersebut berkuat kuasa dan pelantikannya sebelum penamatan tersebut, dibuat di bawah Pekeliling tersebut. Terma-terma dan syarat-syarat oleh itu mengikat beliau dan hak istimewa pelantikan tersebut tertakluk kepada kerajaan negeri. Walaupun terdapat kebarangkalian dakwaan pemohon bahawa beliau menerima sokongan dan kepercayaan majoriti seisi rumah di rumah panjangnya tetapi ini bukanlah alasan untuknya terus bergantung kepada jawatannya sebagai Tuai Rumah (lihat perenggan 10).

(2) Memandangkan pemohon memegang jawatan Tuai Rumah pada perkenan kerajaan negeri, alasan-alasan untuk memecat pelantikan beliau tidak terbuka untuk pemeriksaan oleh mahkamah. Dengan membuat kesimpulan sebegini bagaimanapun tidak bermakna pengakhiran buat pemohon. Terdapat kes autoriti-autoriti mencukupi yang menyokong penyataan bahawa dalam sesuatu permohonan untuk semakan kehakiman, mahkamah boleh memeriksa proses membuat keputusan atau cara yang mana keputusan tersebut dibuat, walaupun tidak memberikan merit yang banyak terhadap keputusan (lihat perenggan 12).

(3) Kelewatan melampau dalam menyampaikan keputusan penamatan merupakan sesuatu yang tidak boleh diterima akal dan logik. Kelewatan pemberitahuan penamatan telah memenuhi kriteria ketidakmunasabahan. Keputusan untuk memecat, meskipun pilihan bayaran *honorarium* telah dipilih, secara logik dan penting perlu diberitahu kepada seorang Tuai Rumah sebelum tarikh penamatan berkuat kuasa atau sekurang-kurangnya, pada hari penamatan tersebut dan secara idealnya, *honorarium* perlu dibayar pada masa yang sama apabila keputusan tersebut diberitahu. Ia tidak hanya tidak adil kepada pemohon tetapi juga kepada masyarakat yang diberikan khidmat kerana terdapat kesan yang merumitkan disebabkan kelewatan tersebut.

Seorang Tuai Rumah boleh dan akan dengan senang hati melaksanakan tugas rasminya sebagai Tuai Rumah seperti tindakan biasa mengesahkan dokumen-dokumen untuk orang-orangnya sedangkan dia sebenarnya tidak lagi memegang jawatan tersebut. Dalam keadaan tersebut, pengesahan akan dianggap tidak sah dan mungkin terdapat akibat dari segi undang-undang, kepada pemilik dokumen-dokumen tersebut. Oleh itu, tindakan memberitahu penamatan tersebut hanya selepas beberapa bulan tarikh berkuat kuasa, meskipun sekiranya kelewatan bayaran *honorarium* dibenarkan, telah mengakibatkan penamatan tersebut tidak wajar di sisi undang-undang dan surat penamatan tersebut adalah tidak sah dan terbatal (lihat perenggan 14–15).]

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5119–5123.

Cases referred to

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Malaysia & Anor [2009] 6 MLJ 402, CA (refd)

Ottavio Quattrochi v Menteri Dalam Negeri Malaysia & Ors [2001] 6 MLJ 561, HC (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ridge v Baldwin & Ors [1964] AC 40, HL (refd)

Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352, SC (refd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 53 rr 3(2), 4, Form III B

See Chee How (Baru Bian Advocates & Solicitors) for the applicant.
Saferi bin Ali (State Legal Counsel, State Attorney General's Chambers) for the respondents.

Rhodzariah Bujang J:

[1] The applicant was, until the termination of his appointment as one by

the respondents, the *Tuai Rumah* ('village headman') of Kampung Emplas situated in the district of Simunjan, First Division, Sarawak. The village is a fairly large Iban community as it has a longhouse consisting of 35 doors; one door being equivalent to a single household. He held that esteemed position amongst his villagers since 1961 but was only officially appointed to the post in April 1982. However, by a letter dated 17 June 2011 signed by the first respondent, the District Officer of Simunjan, the applicant was informed of the termination of his appointment, with the letter of termination enclosed and the same was signed by the second respondent, the Director of Human Resource Management Division. The date of the letter of termination is 28 March 2011 and it states the effective date of the termination as 1 April 2011. In other words the applicant was only informed of his termination about two and a half months after the termination has taken effect.

[2] He has on 4 August 2011 filed an application for leave to apply for judicial review of that decision and on 11 November 2011, such a leave was granted. In granting leave, Ravinthran Paramaguru JC held that there is an arguable case whether the termination was in accordance with the circular memorandum appointing him to the post because 'it appears that the revocation was backdated by two and half months'.

[3] Before going into the merits of the substantive application which is now for determination before me, let me first dispose of the preliminary objection raised by the respondents.

NON-COMPLIANCE WITH THE RULES

[4] Order 53 r 4 of the Rules of High Court 1980 ('RHC') provides that within 14 days after leave has been granted the applicant shall file a notice in Form III B and that a sealed copy of the form must be served 'together with a copy of the statement and all affidavits in support on all persons directly affected by the application not later than 14 days before the date of hearing specified in the said form'.

[5] From our court record, it shows that the said notice of hearing was filed on the 22 November 2011 and given a hearing date of 19 December 2011 at 9am but which hearing was adjourned to 31 January 2012 by Ravinthran Paramaguru JC because the sealed copies of it were inadvertently not returned to the applicant's counsel. Our record also shows that Mr Saferi Ali appeared for the respondents on that first date of hearing when the adjournment was made. Thus going by the latest date of hearing given by the court, the 17th of January should be the last date when the said notice and the accompanying documents mentioned in r 4 above should have been served on the respondent's counsel. This was not done and according to their counsel, relying

on Abdul Aziz J's decision in *Ottavio Quattrochi v Menteri Dalam Negeri Malaysia & Ors* [2001] 6 MLJ 561 at p 564, the provision of r 4 being mandatory, the failure to comply is incurable under O 1A of the RHC and therefore the court is not seized with the jurisdiction to entertain this application.

[6] Mr See Chee How for the applicant submitted that the failure is curable by O 1A and that the respondents were not prejudiced by the non-service because the same statement and affidavit in support used at the leave stages are being relied upon by them at the hearing of this substantive application and which documents have been served on the respondents before the hearing of the application for leave. The service of the said documents on the respondents at that leave stage is not disputed.

[7] I believe Mr See Chee How has a good point here. Whilst I do not dispute for a minute that the provision of O 53 r 4 is mandatory, that imperative provision and the duty to comply in this case has been obviated by the fact that the respondents were served with the requisite documents and represented at the leave stage. They had also been given the opportunity to argue fully against the application for leave. It must be noted that the application for leave for judicial review under O 53 r 3(2) is to be made ex parte but the court has in this case exercised its discretion to have it heard inter parte. If the matter had been heard ex parte, I would agree that there must be due compliance with service of the cause papers on the respondents but which was obviously not the case here. That is my first reason for agreeing with Mr See Chee How. The second is that in para 8 of the applicant's statement filed in support of the application for leave, he has clearly stated as follows:

> At the substantive hearing of this application, the applicant will rely on the grounds set out herein as well as those grounds stated in the affidavit of the applicant filed herein.

[8] The respondents, in other words have been put to notice that the very same grounds used in the leave application would be relied upon at the substantive hearing. And, as it turned out to be, no additional grounds were canvassed before me at this substantive hearing. To insist that the very same documents which has been served, be re-served would in my view make a silly mockery of the law for the provision is designed to give the respondents or 'persons affected' the right of representation and to be heard at the hearing. This right of the respondents have not in any way been prejudiced or compromised by the non service of the said documents. Thus, in my view, the non-service of the same is not even a procedural irregularity which needs to be cured and I see no reason to delve further into the legal argument whether O 1A should be invoked in aid of the respondents.

APPOINTMENT OF TUAI RUMAH

[9] The circular memorandum dated 2 October 1980 (exhibited as MT1 to Datu Misnu's affidavit) issued by the acting State Secretary Sarawak, regulates the terms and conditions of the appointment of a *Ketua Kaum* called a *Tuai Rumah* for the Ibans. Firstly, it is stated in the circular at cl 6.1 thereof that a *Ketua Kaum* is not a government officer. It is then provided in the circular that the power of appointment lies with the state secretary who may delegate his authority to the resident of each division in the state (see cl 3.1 thereof) and in respect of termination or revocation of the same, the applicable provision is cl 3.4 thereof which states as follows:

> The appointment in the *Ketua Kaum* Service is made at the pleasure of the Government and may be determined by either side on giving one month's notice or in lieu of notice to pay an equivalent of one month's honorarium.

[10] This circular therefore proves that the applicant's appointment as a *Tuai Rumah* is contractual and it being clearly stated to be at the pleasure of the state government, means that the appointment is at the sole discretion of the appointing authority. Though it cannot be denied that in the days of old, prior to this circular, a *Tuai Rumah* was (as deposed by the applicant in his affidavit in support at the leave application) appointed by way of 'adat' or tradition based on the support the appointee enjoyed from the majority of the households in the longhouse, such consideration is no longer the determinating factor in the post circular period. And in this case, the applicant cannot argue that the circular does not apply to him because he was formally appointed after it came into effect and his appointment, prior to the termination, was made under it. The terms and conditions therefore bind him and the prerogative of the appointment lies solely with the state government. Thus, eventhough there is probability to the applicant's assertion that he still enjoys the support and confidence of the majority of the households in his longhouse, sadly for him this is not a ground for him to continue to cling on to his post as *Tuai Rumah*. Now according to Hj Zainy, the applicant's service was no longer needed because being an old man of 72 years, the applicant's medical examination conducted on 8 March 2011 also shows that he is asthmatic, suffers from diabetes, high blood pressure and joint pain; common enough ailments, I would say, of the elderly and even the not so elderly (see exh ZA2 to his affidavit). Further, and this is more important, Hj Zaini deposed that the applicant has also failed to submit, since 2010, a quarterly report on his activities as the Chairman of *Jawatankuasa Kemajuan dan Keselamatan Kampung* ('JKKK') which he headed by virtue of his office. The respondents therefore submit that he was no longer fit to hold the post. The applicant did not file any affidavit to dispute his medical conditions nor his alleged failure to submit the quarterly reports.

[11] When the unchallenged evidence on his age, medical condition and especially the said omission as chairman of JKKK is viewed together with my earlier consideration that he holds the post at the discretion of the state government, no one can forcefully argue against his non-suitability to continue to hold the post. Not that I am going to anyway and this is primarily because of what was said by the Supreme Court in *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352 at p 359 where Edgar Joseph Jr FCJ quoted with approval Lord Reid's distinction of three types of dismissal cases in *Ridge v Baldwin & Ors* [1964] AC 40 as follows:

(a) that of a servant by a master;

(b) dismissal from an office held during pleasure; and

(c) dismissal from an office where there must be something against a man to warrant a dismissal.

Relevant to this decision is what His Lordship said in respect of the second case, 'so far as (b) is concerned to say that an office is held during pleasure means that the person empowered to dismiss need not have anything against the officer, so he need not give any reason'.

[12] Therefore, since the applicant held the office of *Tuai Rumah* at the pleasure of the state government, the grounds for terminating his appointment is not open for examination by me. Drawing this conclusion however does not mean the end of the line for the applicant and I said this because of another Federal Court case, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 also found in the same law report as said's case but at p 145. Getting guidance again from the same judge as that in said's case which I quoted earlier ie Edgar Joseph Jr FCJ, I am reminded that there are three criteria in which judicial review of an administrative decision can be had and they are, according to His Lordship, following Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374,

(a) illegality;

(b) irrationality; and

(c) procedural impropriety

I am moved to reproduce the same excerpt from Lord Diplock's judgment which was quoted by His Lordship at p 187 of the report in respect of criteria (b), pertinent in my view to the matters at hand:

> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). *It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*. Whether a decision falls within this

> category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review. (Emphasis added.)

The principle of *Wednesbury* reasonableness was also applied by the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. Although the main ratio in *Rama Chandran*'s case is in respect of the court's power in a judicial review in relation to an award by the Industrial Court, the criteria mentioned above are observations made in relation to the general powers of the court for this kind of remedy. In addition to the above, there is sufficient case authorities in support of the statement that in an application for judicial review the court can examine the decision making process or the manner in which the decision is made, although not so much the merit of the decision (see the two Court of Appeal decisions of *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555 and *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Malaysia & Anor* [2009] 6 MLJ 402, both cases cited to me by Mr Saferi Ali). The phrase 'decision making process' in my view does not end when the decision is made. It ought to extend and should cover the administrative acts done up to the time when the decision is conveyed to the applicant. I must therefore now examine it in order to ascertain if it falls within the criteria of irrationality which I have quoted above.

TERMINATION NOTICE OR HONORARIUM

[13] As stated earlier, cl 3.4 provides two ways in which termination of the appointment can be effected; by giving one month notice or by paying a month's honorarium. The respondents have elected to do it by the payment of one month's honorarium. It is not disputed in this case that the one month honorarium was paid to the applicant herein. The payment voucher for it is dated 13 September 2011 and exhibited as ZA4 to Hj Zainy's affidavit.

[14] The undisputed facts as I also have mentioned earlier are that the applicant was only informed of the termination 2½ months after it took effect and he was paid the honorarium 4½ months later. With respect to the respondents and fully acknowledging that they are vested with a complete discretion on who to appoint as *Tuai Rumah*, the inordinate delay in conveying the decision on the termination is in complete defiance of reason and logic. The late communication of the termination, in my view, has satisfied the criteria of irrationality mentioned in Lord Diplock's judgment.

[15] The reasons for my conclusion is this. The decision to terminate, even if the option of payment of the honorarium was chosen, must logically and of necessity be communicated to a *Tuai Rumah* before the effective date of termination or at the very least, on the very day of the termination itself and ideally, the honorarium be paid at the same time as when the decision is communicated. With respect to the respondents, I am compelled to ask this pertinent question: What is the use and where lies the logic of telling a man that he is no longer the anointed leader long after his appointment has been revoked? It is not only unfair to the applicant but to the community he serves for there are ramifications following such a delay. A *Tuai Rumah* in that same position the applicant would and could have happily performed his official duties as *Tuai Rumah* such as the common act of certifying or verifying documents for his people when in fact he was no longer holding the post as one. In that circumstance, the certification or verification would be rendered invalid and may even have legal repercussions, to the owner of the documents. Therefore, the act of notifying him of the termination only so many months after the effective date, even if one were to excuse the delay in payment of the honorarium, has rendered the termination bad in law and the letter of termination null and void. The decision to terminate him ought to be quashed, I agree but this of course does not prevent the respondents from again exercising their right under the said cl 3.4. The application is thus allowed in terms of para 6(a) and (b) of the statement dated 3 August 2011 with a further order that the applicant be paid the arrears of his honorarium from April 2011 until to date but minus the one month honorarium which has been paid to him following the void termination letter. Lastly, cost of the summons in chambers for dismissal of the action is fixed at RM3,000 and that of the application is fixed at RM7,000.

Application allowed in part.

Reported by Ibnu Aswan